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## Attorneys for Defendants

JPMorgan Chase Bank, N.A. an acquirer of certain assets and liabilities of Washington Mutual Bank from the Federal Deposition Insurance Corporation Acting as Receiver, erroneously sued as "Chase Bank," and California Reconveyance Company

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

SEPEHR TORABI,

**Plaintiff,**

V.

WASHINGTON MUTUAL BANK,  
CHASE BANK, DEUTSCHE BANK,  
CITIBANK, CALIFORNIA  
RECOVNEYANCE COMPANY, and,  
DOES 1 through 10, INCLUSIVE

## Defendants.

Case No. 12-CV-1299-WQH-BLM

Hon. William Q. Hayes

**DEFENDANTS JP MORGAN  
CHASE BANK, N.A.'S AND  
CALIFORNIA RECONVEYANCE'S  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN REPLY TO  
OPPOSITION TO THEIR MOTION  
TO DISMISS THE COMPLAINT  
PURSUANT TO FRCP 12(B)(6)**

**[NO ORAL ARGUMENT UNLESS  
REQUESTED BY THE COURT]**

DATE: September 4, 2012  
TIME: 11:00 a.m.  
CTRM: 4 (4<sup>th</sup> Floor)

**Action Filed:** May 30, 2012

1                   **MEMORANDUM OF POINTS AND AUTHORITIES**

2                   Defendants JPMorgan Chase Bank, N.A. an acquirer of certain assets and  
 3 liabilities of Washington Mutual Bank from the Federal Deposit Insurance  
 4 Corporation Acting as Receiver, erroneously sued as "Chase Bank" ("JPMorgan"),  
 5 and California Reconveyance Company ("CRC") (collectively "Defendants")  
 6 respectfully submit the following Memorandum of Points and Authorities in reply to  
 7 opposition to their Motion to Dismiss the Complaint ("Complaint") of plaintiff Sepher  
 8 Torabi ("Plaintiff") under Federal Rules of Civil Procedure ("FRCP") section 12(b)(6).

9                   **I.        SUMMARY OF ARGUMENT**

10                  Plaintiffs' Opposition to the Motion to Dismiss offers nothing in terms of  
 11 substantive opposition to the legal arguments raised in the motion or explanation of  
 12 how Plaintiff can amend his Complaint to state claims against Defendants. As a result,  
 13 Defendants' Motion to Dismiss should be granted without leave to amend.

14                  **II.      PLAINTIFF'S FIRST CLAIM TO SET ASIDE AND VACATE THE**  
 15                  **TRUSTEE'S SALE FAILS DUE TO PLAINTIFF'S FAILURE TO**  
 16                  **TENDER THE AMOUNT OWED ON THE LOAN**

17                  In their Motion to Dismiss, Defendants cited numerous cases establishing that  
 18 in order to maintain a claim to set aside and vacate a trustee's sale, the plaintiff is  
 19 required to tender the entire amount owed on the loan. *Fleming v. Kagan*, 189  
 20 Cal.App.2d 791, 796-797 (1961); *United States Cold Storage v. Great Western*  
 21 *Savings & Loan Association*, 165 Cal.App.3d 1214, 1225 (1985); *Karlsen v.*  
 22 *American Savings & Loan Association*, 15 Cal.App.3d 112 (1971); *Abdallah v. United*  
 23 *Savings Bank*, 43 Cal.App.4th 1101, 1109 (1996). In response, Plaintiff argues that he  
 24 could have tendered in 2009, but makes no representation that he is willing and able to  
 25 tender the entire amount owed on the subject loan (the "Loan") at this time in order to  
 26 maintain this claim.

1        Additionally, Plaintiff failed to address the fact that 12 U.S.C. § 3757 is  
2 inapplicable because the Loan was not foreclosed by the Secretary of the Department  
3 of Housing and Urban Development ("HUD"), nor did Plaintiff refute Defendants'  
4 argument that the Notice of Trustee's Sale recorded against the Subject Property  
5 complied with Civil Code § 2924f.

6        As a result, Defendants' motion as to the first claim should be granted without  
7 leave to amend.

8        **III. UNJUST ENRICHMENT IS A REMEDY, NOT A CLAIM –**  
9        **THEREFORE PLAINTIFF'S SECOND CLAIM FOR UNJUST**  
10      **ENRICHMENT FAILS**

11       Plaintiff's second claim for unjust enrichment fails because "unjust enrichment  
12 is not a cause of action." *Jogani v. Superior Court of Los Angeles County*, 165 Cal.  
13 App. 4<sup>th</sup> 901, 911 (2008), *citing Melchior v. New Line Productions, Inc.*, 106 Cal.  
14 App. 4<sup>th</sup> 779, 793 (2003) ("[T]here is no cause of action in California for unjust  
15 enrichment."). Moreover, Plaintiff has failed to allege a valid claim that would  
16 provide for an unjust enrichment remedy that is capable of withstanding this Motion  
17 to Dismiss. Therefore, Defendants' motion as to Plaintiff's second claim must be  
18 granted without leave to amend.

19       **IV. PLAINTIFF THIRD CLAIM FOR VIOLATION OF BUSINESS &**  
20      **PROFESSIONS CODE § 17200 FAILS**

21       In his Opposition, as to the his third claim for violation of Business &  
22 Professions Code § 17200 (Unfair Competition Law, or "UCL"), the sum and  
23 substance of Plaintiff's argument is his conclusory contention that, as he claims to  
24 have alleged in his Complaint, "Defendants violate common law for Unjust  
25 Enrichment, Fraud, Negligence." Opposition, p. 4:18-21.

1       Other than in the conclusory sentence referenced above, Plaintiff fails to refute  
 2 Defendants' contention that Plaintiff's UCL allegations contained in his Complaint are  
 3 wholly inadequate.

4       Plaintiff offers no response to Defendants' contention that his allegations at ¶¶  
 5 25-28 of his Complaint that JPMorgan and co-defendant WaMu conducted the  
 6 trustee's sale in violation of 12 U.S.C § 3757 and California Civil Code § 2924, *et seq.*,  
 7 fail because 12 U.S.C § 3757 does not apply to the Loan, and Plaintiff has otherwise  
 8 failed to allege facts constituting lack of compliance with California Civil Code §  
 9 2924, *et seq.* Because Plaintiff has failed to allege in his Opposition how Plaintiff  
 10 could possibly amend his Complaint to allege a UCL claim, Plaintiff's fourth claim  
 11 should also be dismissed without leave to amend.

12      **V. PLAINTIFF'S FOURTH CLAIM FOR FRAUD FAILS DUE TO**  
 13      **PLAINTIFF'S FAILURE TO ALLEGE THE ELEMENTS OF FRAUD**  
 14      **WITH THE REQUISITE DEGREE OF SPECIFICITY, WHETHER**  
 15      **FRAUD UNDER COMMON OR BUSINESS & PROFESSIONS CODE §**  
 16      **17200**

17       In his Complaint, Plaintiff identifies his fourth claim as one for "Common Law  
 18 Fraud," but in the body of his Complaint, Plaintiff clearly bases his fourth claim upon  
 19 the "fraudulent" prong of Business & Professions Code § 17200. Yet, in his  
 20 Opposition, Plaintiff cites to the common law to support his conclusory contention that  
 21 he has stated a claim for fraud. Either way, Plaintiff's fraud claim fails.

22       The elements necessary to state a cause of action for fraud are: (1) a false  
 23 representation of a material fact; (2) knowledge of the falsity (*scienter*); (3) intent to  
 24 induce reliance; (4) justifiable reliance; and (5) resulting damage. *Philipson & Simon*  
 25 v. *Gulsvig*, 154 Cal. App. 4th 347, 363 (2007). The particularity requirement for  
 26 fraud mandates pleading facts that "show how, when, where, to whom, and by what  
 27 means the representations were tendered." *Robinson Helicopter Co., Inc. v. Dana*

1 *Corp.*, 34 Cal. 4th 979, 993 (2004).

2 Federal Rule of Civil Procedure (“FRCP”) 9(b) requires a cause of action for  
 3 fraud to be pled with particularity and “with a high degree of meticulousness.”  
 4 *Desaigoudar v. Meyercord* 223 F3d 1020, 1022–1023 (9th Cir. 2000). Conclusory  
 5 allegations without a factual description of the underlying conduct will not satisfy the  
 6 requirements for pleading fraud with particularity and may warrant dismissal. *In re*  
 7 *Barr*, 188 B.R. 565, 570 (Bkrtcy.N.D.Ill., 1995), (Citing *Veal v. First Am. Sav. Bank*  
 8 914 F.2d 909, 913 (7th Cir.1990).

9 In his Opposition, Plaintiff argues that Defendant JPMorgan, with no mention of  
 10 Defendant CRC, committed fraud when it "failed to disclose and concealed certain  
 11 material facts with the intent to defraud the Plaintiff, which Plaintiff has sufficiently  
 12 plead." Opposition, p. 4:27-28. Plaintiff fails to allege, in his Opposition and in the  
 13 Complaint itself, what material facts JPMorgan was obligated to disclose, when it was  
 14 obligated to disclose them, and who concealed or failed to disclose those material  
 15 facts. Moreover, Plaintiff again failed to allege how he could possibly amend his  
 16 Complaint to state a claim for fraud.

17 Based on the foregoing, Plaintiff's fourth claim should be dismissed without  
 18 leave to amend.

19 **VI. PLAINTIFF'S FIFTH CLAIM FOR NEGLIGENCE FAILS DUE TO**  
 20 **THE LACK OF A DUTY OF CARE OWED BY DEFENDANTS TO**  
 21 **PLAINTIFF**

22 In his Opposition, Plaintiff completely fails to address the fact that neither  
 23 JPMorgan nor CRC owed Plaintiff a legal duty of care. *Perlas v. GMC Mortg., LLC*,  
 24 187 Cal.App.4<sup>th</sup> 429, 436 (2010); *Nymark v. Heart Fed. Savings & Loan Assn.*, 231  
 25 Cal. App. 3d 1089, 1093 (1991) (generally, “a financial institution owes no duty of care  
 26 to a borrower when the institution’s involvement in the loan transaction does not  
 27 exceed the scope of its conventional role as a mere lender of money.”); *Abdallah v.*

*United Savings Bank*, 43 Cal.App.4th 1101, 1109 (1996) (trustee under a deed of trust owes no legal duty to the trustor). Having failed to establish the very first element of negligence, the existence of a legal duty of care owed by Defendants to Plaintiff, Plaintiff's negligence claim fails and must be dismissed.

Further, because Plaintiff has failed to demonstrate how he can amend his Complaint to overcome the rules stated in *Perlas*, *Nymark* and *Abdallah* and establish a legal duty of care on the part of Defendants, Plaintiff's claim for negligence should be dismissed without leave to amend.

VII. **PLAINTIFF'S SIXTH "CLAIM" FOR APPLICATION FOR A TRO IS UNOPPOSED AND SHOULD BE DISMISSED WITHOUT LEAVE TO AMEND**

Plaintiff's "claim" for injunctive relief is unopposed. Having abandoned it, Plaintiff's sixth cause of action should be dismissed without leave to amend.

## VIII. CONCLUSION

For the foregoing reasons, and the reasons stated in their moving papers, defendants JPMorgan and CRC respectfully request that the Court dismiss the Complaint in its entirety, without leave to amend.

DATED: August 28, 2012

Respectfully submitted,

ALVARADOSMITH  
A Professional Corporation

By: /s/ Theodore E. Bacon  
THEODORE E. BACON  
DAVID J. MASUTANI  
Attorneys for Defendants  
JPMorgan Chase Bank, N.A. an acquirer  
of certain assets and liabilities of  
Washington Mutual Bank from the Federal  
Deposition Insurance Corporation Acting  
as Receiver, erroneously sued as "Chase  
Bank," and California Reconveyance  
Company

**CERTIFICATE OF SERVICE**  
**STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is ALVARADOSMITH, APC 633 W. Fifth Street, Suite 1100, Los Angeles, CA 90071.

On August 28, 2012, I served the foregoing document described as  
**DEFENDANTS JP MORGAN CHASE BANK, N.A.,' SAND CALIFORNIA**  
**RECONVEYANCE'S MEMORANDUM OF POINTS AND AUTHORITIES IN**  
**REPLY TO OPPOSITION TO THEIR MOTION TO DISMISS COMPLAINT**  
**PURSUANT TO FRCP 12(B)(6)** on the interested parties in this action.

- by placing the original and/or a true copy thereof enclosed in (a) sealed envelope(s), addressed as follows:

Sepher Torabi, *Pro Se*  
3253 Caminito East Bluff #26  
La Jolla, CA 92037  
Tel. (858) 518-1515

- BY ELECTRONIC SERVICE:** Pursuant to CM/ECF System, registration as a CM/ECF user constitutes consent to electronic service through the Court's transmission facilities. The Court's CM/ECF system sends an email notification of the filing to the parties and counsel of record listed above who registered with the Court's CM/ECF system.
  - BY FACSIMILE MACHINE:** I Tele-Faxed a copy of the original document to the above facsimile numbers.
  - BY OVERNIGHT MAIL:** I deposited such documents at the Overnite Express or FedEx Drop Box located at 633 W. Fifth Street, Los Angeles, California 90071. The envelope was deposited with delivery fees thereon fully prepaid.
  - BY REGULAR MAIL:** I placed such envelope with postage thereon fully paid in the United States mail at Los Angeles, California. I am "readily familiar" with this firm's practice of collecting and processing correspondence for mailing. It is deposited with U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.
  - (Federal) I declare that I am employed in the office of a member of the Bar of this Court, at whose direction the service was made.

Executed on August 28, 2012, at Los Angeles, California.

Bennida Slack